(1)

90-795

CASE NO.

IN THE SUPREME COURT

OF THE UNITED STATES

ANGEL TORO, a/k/a

SAMMY TORO,

Appellant,

vs.

RICHARD L. DUGGER,

ROBERT BUTTERWORTH,

Attorney General For

The State of Florida,

Appellee,

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF APPEALS, ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GUSTAVO GUTIERREZ, ESQ.

155 South Miami Avenue

Penthouse One

Miami, Florida 33130

(305) 372-1313

QUESTION PRESENTED FOR REVIEW

WHETHER A PRISONER WHOSE SPEEDY TRIAL RIGHTS HAVE BEEN VIOLATED UNDER THE INTERSTATE AGREEMENT ON DETAINERS MUST SHOW PREJUDICE IN ORDER TO OBTAIN HABEAS CORPUS RELIEF IN FEDERAL COURT.

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REFERENCE TO OFFICIAL REPORTS OF OPINIONS

On December 10, 1985, the District Court of Appeals of Florida, Third District, affirmed the decision of the Trial Court. (See Exhibit 3 to the Appendix).

On October 19, 1989, the United States District Court, for the Southern District of Florida, denied the prisoner's Petition For Writ of Habeas Corpus. A copy of said Order of Dismissal is attached as Exhibit 2 to the Appendix.

On August 17, 1990, the United States Courts of Appeals, for the Eleventh Circuit, affirmed the decision of the United States District Court. A copy of said opinion and Judgment, are attached hereto as Exhibit 1 to the Appendix.

STATEMENT OF GROUNDS FOR JURISDICTION

On August 17, 1990, the Eleventh Circuit Court of Appeals, issued its opinion (See copy of said opinion attached as Exhibit "1" to the Appendix). No rehearing was sought nor extension of time within which to file this Petition For Writ of Certiorari has been sought or granted.

This Court has historically exercised its discretionary powers to issue Writs of Certiorari when questions of Federal statutory interpretation have divided the lower courts. Rule 10.1(a) of this Court allows the granting of this Writ when a United States Court of Appeals has rendered a decision in conflict with the decisions of other United States Courts of Appeal. THE PRISONER believes that such conflict confers

jurisdiction upon this Court to review the Judgment of the 11th Circuit Court of Appeals.

STATUTE INVOLVED IN THE CASE

Pursuant to Rule 14.1(F) of this Court the pertinent text of Florida's Interstate Agreement on Detainer, Florida Statute Section 941.45 is set forth in the Appendix filed with this Petition. (See Exhibit 4 to the Appendix).

STATEMENT OF THE CASE AND FACTS

Appellant, Angel Toro, seeks reversal of the judgment and opinion rendered by the United States Eleventh Circuit Court of Appeals upholding the denial of a Petition For Writ of Habeas Corpus filed in the United State District Court for the Southern District of Florida.

The parties will alternately be referred to herein as they stand on appeal and as follows: Appellant as "THE PRISONER" and Appellee as "THE STATE".

All emphasis appearing in this brief is supplied by counsel unless otherwise noted.

On January 6, 1984, THE PRISONER was transferred from Oxford, Wisconsin to Florida pursuant to the provisions of Florida Statutes Section 941.45

(Interstate Agreement on Detainers, hereinafter referred to as the IAD).

Neither THE STATE nor THE PRISONER sought a continuance of the trial pursuant to the provisions of the IAD. On August 28, 1984, THE PRISONER moved to dismiss the indictment pursuant to the speedy trial provisions of the IAD. On September 13, 1984, the Trial Court denied THE PRISONER's Motion for Discharge.

On November 30, 1984, THE PRISONER pled nolo contendere to a lesser offense specifically preserving his right to appeal his denial of speedy trial rights under the IAD.

THE PRISONER sought a timely appeal in the District Court of Appeals of Florida, Third District. On December 10, 1985, the Florida Third District Court of Appeals affirmed the trial court's denial of the Motion for Dis-

charge.

THE PRISONER then sought habeas corpus relief from the United States District Court for the Southern District of Florida. On October 19, 1989 the United States District Court for the Southern District of Florida dismissed the habeas corpus petition.

THE PRISONER appealed said decision to the United States Courts of Appeals for the 11th Circuit. On August 17, 1990, the 11th Circuit issued its opinion denying relief. This timely appeal ensued.

Federal jurisdiction rests on the fact that the IAD is a Law of the United States and may serve as a basis for collateral relief. United States Ex. Rel. Esola v. Groomes, 520 F.2d 830 (3rd Cir. 1975), United States v. Williams, 615 F.2d 585 (3rd Cir. 1980), Casper v. Ryan, 822 F.2d 1283 (3rd DCA 1987),

Seymore v. State of Alabama, 846 F.2d 1355 (11th Cir 1988). Article I, Section 10, Clause 3, United States Constitution and 28 U.S.C. Section 2254.

ARGUMENT IN SUPPORT OF THIS PETITION FOR WRIT OF CERTIORARI

Florida's Interstate Agreement on Detainers provides in pertinent part as follows:

> "In respect of any proceeding made possible by this subsection, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the Court having jurisdiction of the matter may grant any necessary or reasonable continuance.
>
> If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner being returned to the

original place of imprisonment pursuant to paragraph (3) of subsection (5), such indictment, information or complaint shall not be of any further force and effect, and the Court shall enter an order dismissing the same with prejudice.

Florida Statutes Section 941.45 (Emphasis added)

It has been universally held and the Courts of the State of Florida have agreed that where the language of a statute is clear and unambiguous and convey a definite meaning, courts should not resort to rules of statutory interpretation and construction. Winter v. Plaza del Sol, Inc., 353 So.2d. 598 (Fla. 4th DCA 1977). It is uncontraverted that THE PRISONER did not seek to show specific prejudice based on his denial of speedy trial rights under

the IAD. The central question to be decided, is whether a violation of the speedy trial provisions of the IAD without a specific showing of prejudice forms a basis for Habeas Corpus relief.

There is no question that the IAD is a congressionally sanctioned interstate compact within the context of the compact clause of the United States Constitution Article 1, Section 10, Clause 3, Cuyler v. Adams, 449 U.S. 433, 101 S.Ct. 703, 66 L.Ed. 641 (1981).

In 1988, the Eleventh Circuit Court of Appeals decided to follow what appears to be the majority rule based on the rationale of Davis v. United States, 417 U.S. 333, 94 S. Ct. 298, 41 L. Ed.2d 109 (1981). The Eleventh Circuit was persuaded by the decisions of the First, Second, Fourth, Eight, Ninth and Tenth Circuits that have held various violations of the IAD as non-fundamental

defects absent a showing of prejudice.

However, the Ninth Circuit has also held that a violation of the IAD is not a mere technical error and that prejudice need not be shown in a Petition for Writ of Habeas Corpus. Brown v. Wolff, 106 F.2d 902 (9th Cir. 1982). The Ninth Circuit has also found that a violation of the 120 day speedy trial rule under the IAD was cognizable in Federal Habeas Corpus proceedings, Cody v. Morris, 623 F.2d 101 (9th Cir. 1980). Similarly, in Tinghitella v. State of California, 718 F.2d 308 (9th Cir. 1983) the Court held that a violation of the time provisions of the IAD is a cognizable defect and can be addressed by Habeas Corpus relief. Thus, it appears that even within the Ninth Circuit there is conflicting opinion as to whether a technical violation of speedy trial provisions of the IAD constitutes a cog-

nizable defect deserving Habeas Corpus relief. Similarly, the Fifth Circuit seems to have reached differing conclusions regarding whether violations of the IAD are cognizable defects entitling the Defendant to Habeas Corpus relief, Gibson v. Klevenhagen, 777 F.2d 1056 (5th Cir. 1985) and Sassoon v. Stynchombe, 654 F.2d 371 (5th Cir. Unit B 1981).

The position adopted by the District Court of Appeals, Eleventh Circuit is adhered to by:

a. The First Circuit: Fasano v. Hall, 615 F.2d 555 (1st Cir. 1980) cert. denied 449 U. S. 861, 101 S.Ct. 201, 66 L. Ed.2d 86 (1980);

b. The Second Circuit: Edwards v. United States, 564 F.2d 652 (2nd Cir. 1977);

c. The 4th Circuit: Bush v. Muncey, 659 F.2d 402 (4th Cir. 1981),

Kerr v. Finkbeiner, 757 F.2d 604 (4th Cir. 1985) cert. denied 479 U.S. 929, 106 S.Ct. 263, 88 L.Ed.2d 269 (1985);

d. The Fifth Circuit: Sassoon v. Stynchombe, supra, (but see Gibson v. Klevenhagen, supra,;

e. The Sixth Circuit: Metheny v. Hamby, 835 F.2d 672 (6th Cir. 1987), cert. denied 109 S.Ct. 270 (1988), Mars v. United States, 615 F.2d 704 (6th Cir. 1980) cert. denied 449 U.S. 849, 101 S.Ct. 138, 66 L.Ed.2d 60 (1980);

f. The Eighth Circuit: Huff v. United States, 599 F.2d. 860 (8th Cir. 1979) cert. denied 444 U.S. 952, 100 S.Ct. 428, 62 L.Ed.2d 323 (1979);

g. The Ninth Circuit: United States v. Boniface, 601 F.2d 390 (9th Cir. 1979); Hitchcock v. United States, 580 F.2d 964 (9th Cir. 1978); and by

h. The 10th Circuit:

Greathouse v. United States, 655 F.2d. 1032, (10th Cir. 1981). Cert. denied 455 U.S. 926, 102 S.Ct. 1289, 71 L.Ed2d 469 (1982).

However, contrary results have been reached by the following United States Courts of Appeal:

a. The Third Circuit: United States v. Williams, supra.

b. The Fifth Circuit: Gibson v. Klevenhagen, 777 F.2d 1056 (5th Cir. 1983); and

c. The Ninth Circuit: Tinghitella v. State of California, supra, Cody v. Morris, supra, and Johnson v. Stagner, 781 F.2d 758 (9th Cir. 1986).

Although not squarely on point, the Eighth Circuit has held that Missouri's failure to provide a prisoner with a pre-transfer hearing under the IAD and the opportunity to secure counsel pursuant to the act rose to the required

level of seriousness to entitle the prisoner to habeas relief. Cavallaro v. Wyrick, 701 F.2d 1273 (8th Cir. 1983).

This Court has denied certiorari on this issue on a number of occasions; Fasano v. Hall, supra, Kerr v. Finkbeiner, supra, Mars v. United States, supra, Huff v. United States, supra, Casper v. Ryan, supra, Greathouse v. United States, supra, Metheny v. Hamby, supra.

In Kerr v. Finkbeiner, supra, Justice White in his dissenting opinion suggested that certiorari be granted:

> "The conflict among the Circuits on this issue is clear. In some circuits an IAD violation that constitutes an absolute defense under the agreement can, without more serve as a basis for habeas relief. In others, prejudice must be shown. Furthermore, it is

obvious that the issue is a recurring one. I would grant the Petition to settle this conflict." As Justice White also noted in his dissent in Metheny v. Hamby, supra: "I also note that, the Court granted certiorari...so far this term in at least 12 cases, which like these, raise questions of Federal Statutory interpretation that have divided the lower Courts... It is not immediately apparent to me as it must not be to litigants in the cases in which certiorari was denied or to Judges in the Federal and State Court systems, -- why the Court granted certiorari in these 12 cases, but not in the previously listed 16 in which I have dissented or I am dissenting from the denial of review."

It is THE PRISONER'S position that the majority view also conflicts with the view of this Court as expressed in

United States v. Mauro, 98 S.Ct. 1834, 4326 U.S. 340, 56 S. Ed.2d 329 (178). As a matter of public policy, it appears to THE PRISONER that the majority position trivializes the Appellate process and Habeas Corpus proceedings. Rather than having a prophylactic approach which would invariably result in litigation regarding the issue of whether prejudice has been shown, the minority view, and the view expressed by this Court in United States v. Mauro, supra, would penalize States for noncompliance with the IAD. Congress intended the IAD to be strictly construed. The majority of the Circuit Courts of Appeal have emasculated the Statute by requiring a showing of prejudice before Habeas relief can be granted.

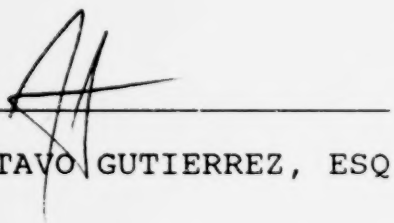
The issue has not bee squarely addressed by this Court although it is a recurring problem which will continue to

be raised until a definite answer is given.

It is respectfully submitted that Justice White's dissent in Kerr v. Finkbeinner, supra, and Metheny v. Hamby, supra, show valid reasons why this Petition For Writ of Certiorari should be granted and the issue of whether violations of the IAD are fundamental defects cognizable in Habeas Corpus proceedings should be put to rest.

Respectfully submitted,

GUSTAVO GUTIERREZ, P.A.

BY: 

GUSTAVO GUTIERREZ, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by mail to Fariba N. Komeily, Assistant Attorney General, 401 N.W. 2nd Avenue, N921, Miami, Florida 33128, on this 14 day of November, 1990.

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CASE NO.

IN THE SUPREME COURT

OF THE UNITED STATES

ANGEL TORO, a/k/a

SAMMY TORO,

Appellant,

vs.

RICHARD L. DUGGER,

ROBERT BUTTERWORTH,

Attorney General for

the State of Florida

Appellee,

_____/

ON APPEAL FROM THE UNITED

STATES DISTRICT COURT OF

APPEALS, ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR

WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEAL

FOR THE ELEVENTH CIRCUIT

No. 89-6147

Non-Argument Calendar

D.C.Docket No. 87-1959 -Civ-JCP

ANGEL TORO, a/k/a
Sammy Toro,

Petitioner-Appellant,

versus

RICHARD DUGGER,
ROBERT BUTTERWORTH,
Attorney General
for the State of
Florida,

Respondents-Appellees.

EXHIBIT 1

Appeal from the United States District Court for the Southern District of Florida

---

(August 17, 1990)

Before FAY, ANDERSON, and COX, Circuit Judges.

PER CURIAM:

Petitioner in this case challenges the district court's dismissal of his petition for habeas corpus. He quite candidly concedes that the district court's action comports with our decision in Seymore v. State of Alabama, 846 F.2d 1355 (11th Cir. 1988), but requests that we reconsider Seymore and hold that the denial of speedy trial rights as guaranteed by the Interstate Agreement on Detainers ("IAD") constitutes grounds for habeas corpus relief, regardless of whether petitioner can show specific prejudice. 1

---

1 Petitioner's counsel is to be commended for the forthright manner in which he has handled this issue. His candid presentation of the issue has been most beneficial to the court.

It is without question that there exists divergent authority as to whether violations of the IAD, without more, can provide grounds for relief under 28 U.S.C. Section 2254. See Metheny v. Hamby, _____ U.S. _____, 109 S.Ct. 270 (1988) (White, J., dissenting from denial of certiorari). The law of this circuit is that "various violations of the IAD are nonfundamental defects and--absent a showing of some sort of prejudice --are uncognizable in a federal habeas proceeding." Seymore, 846 F.2d at 1359. We are bound by this determination and, absent an intervening Supreme Court or in banc decision, must abide by it. See Centel Cable v. White Development Co., No. 89-5318, slip op. 3080, 3083-84 (11th Cir. June 5, 1990).

In Seymore, we held that failure to comply with the time limits of Article III (a) is one such violation. 846 F.2d

at 1359-60. Here, petitioner's claim is that the state of Florida violated the time provisions in Article IV(c) of the IAD. Because there is no principled manner in which to distinguish the nature of harm caused by a violation of the time limits in Article III(a) from a violation of the time limits in Article IV, Seymore dictates that petitioner's claim is only cognizable in federal habeas if he can make some showing of prejudice. No such allegation of prejudice has been made in this case.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 89-6147

NON-ARGUMENT CALENDAR

C.D.DOCKET NO. 87-1959-Civ-JCP

ANGEL TORO, a/k/a

Sammy Toro,

Petitioner-Appellant,

versus

RICHARD DUGGER,

ROBERT BUTTERWORTH, Attorney

General For the State

of Florida,

Respondent-Appellees.

Appeal from the United States

District Court for the Southern

District of Florida

Before FAY, ANDERSON and COX,

Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and same is hereby AFFIRMED.

Entered: August 17, 1990

For the Court: Miguel J. Cortez, Clerk

BY: _____

Deputy Clerk

ISSUED AS MANDATE; September 13, 1990

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-1959-Civ-Paine

ANGEL TORO,

Plaintiff

v.

RICHARD L. DUGGER,
Secretary of Florida
Department of
Corrections,

Defendant.

ORDER OF DISMISSAL

Before the court is the report and recommendation of United States Magistrate Ann E. Vitunac filed September 22, 1989 (DE 8). The Magistrate has recommended that the petition for writ of habeas corpus by Angel Toro be denied. The Magistrate reviewed the

EXHIBIT 2

record of this proceeding brought pursuant to 28 U.S.C. Section 2254 and provided an analysis of the facts and the applicable law. This Court has considered the matter de novo. No facts are alleged in this case which show prejudice to the defendant as a result of the delay of his trial in the courts of the state of Florida following his arrival in the Florida judicial system under the Interstate Agreement on Detainers Act. Seymore v. State of Ala., 846 F.2d 1355 (11th Cir. 1988) makes it clear that where no prejudice is shown, a claim of speedy trial violation because of time periods prescribed by the Interstate Agreement on Detainers is not cognizable in a federal habeas proceeding. Violations of IAD have been held to be non-fundamental defects and, for that reason, are not cognizable.

It is, therefore,

ORDERED AND ADJUDGED that the report and recommendation of the Magistrate is approved. It is further

ORDERED AND ADJUDGED that the recommendation of the Magistrate become the order of this court and that the petition of Angel Toro for a writ of habeas corpus be and the same is hereby denied.

DONE AND ORDERED at West Palm Beach, Florida, this 19th day of October, 1989.

"James Paine"

_____

United States District Judge

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1985

ANGEL TORO a/k/a *
SAMMY TORO, *
Appellant, * CASE NO.85-15
vs *
THE STATE OF FLORIDA *
Appellant. *

Opinion filed December 10, 1985.

Appeal from the Circuit Court for Dade County, Thomas M. Carney, Judge.

Gustavo Gutierrez, for Appellant.

Jim Smith, Attorney General, and Calvin L. Fox, Assistant Attorney General, for appellee.

EXHIBIT 3

Before SCHWARTZ, C.J. and HENDRY and NESBITT, JJ.

SCHWARTZ, Chief Judge.

The Defendant's sole contention, preserved through the entry of a nolo plea, is that he is entitled to dismissal because he was not scheduled for trial within the 120 day period provided by Article IV(C) of the Interstate Agreement on Detainers, Section 941.45(4)(c), Fla.Stat.(1983). (1) We disagree.

---

1. Sec. 941.45 (4)(c) provides:

(c) In respect of any proceeding made possible by this subsection, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his

counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

This section of the IAD applies because Toro was brought here pursuant to a Florida detainer lodged against him while he was serving a federal sentence.

Applying the body of federal law which controls the interpretation of the IAD, Cuyler v. Adams, 449 U.S. 433, 438-42, 101 St.Ct. 703, 706-09, 66 L. Ed.2d 641, 647-50 (1980), we find that the delays complained of resulted from (a) Toro's own extended efforts to obtain counsel, Naughton v. State, 453 A.2d 796 (Del. 1982); see United States v. Scheer, 729 F.2d 164 (2d Cir. 1984); and (b) the lower court's setting the trial on a date which coincided with that requested by and already set for a co-defendant and which afforded Toro's finally retained attorney sufficient

time to prepare; it thus represented an entirely appropriate continuance for good cause as specifically authorized by Article IV(c). Naughton v. State, supra; see United States v. Odom, 674 F.2d 228 (4th Cir. 1982), cert. denied, 457 U. S. 1125, 102 S.Ct. 2946, 73 L.Ed. 1341 (1982). Hence, there was no violation of the defendant's rights under the statute. See cases collected, Annot., Validity Construction, and Application of interstate Agreement on Detainers, 98 A.L.R.3d 160 Section 28 (b) (1980).

In addition, it appears that the defense acquiesced in fixing the trial date beyond the statutory period and therefore may not now be heard to complain.2 Foran v. Metz, 463 F. Supp. 1088 (S.D.N.Y. 1979), aff'd mem. 603 F.2d 212 (2d Cir. 1979), cert. denied, 444 U.S. 830, 100 St.Ct. 58, 62 L.Ed.2d 38 (1979); Pehtel . State, 427 N.E. 2d

891, 893-95 (Ind. App. 1981).

AFFIRMED.

---

2. A Different result on this point would be required by the Florida speedy trial law, see Stuart v. State, 360 So.2d 406 (Fla. 1978).

INTERSTATE AGREEMENT ON DETAINERS

941.45. Agreement on Detainers

The interstate compact known as the "Agreement on Detainers" is enacted into law and entered into by the State as a party, and is of full force and effect between the state and any other states joining therein in the form substantially as follows:

(1) Policy and purpose. The party states find that charges outstanding against a prisoner, detainers based on untried indictments, information, or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this

agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

(2) Definitions. -- As used in this agreement:

(a) "State" means the United States of America, a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(b) "Sending state" means a state in which a prisoner is incarcerated at

the time he initiates a request for final disposition pursuant to subsection (3) or at the time that a request for custody or availability is initiated pursuant to subsection (4).

(c) "Receiving state" means the state in which trial is to be had on an indictment, information, or complaint pursuant to subsection (3) or subsection (4).

(3) Request for final disposition.--

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial

within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint; provided that, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner,

and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

(d) Any request for final disposi-

tion made by a prisoner pursuant to paragraph (a) shall operate as a request for final disposition of all untried indictments, information, or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any in-

dictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment. such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d), and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his

presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this section. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) shall void the request.

4) Request for custody or availability. --

(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he had lodged a detainer and who is serving a term of imprison-

ment in any party state made available in accordance with subsection (5)(a) upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided that the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request and provided further that there shall be a period of thirty (30) days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a), the appropriate authorities having

the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole, eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this subsection, trial shall be commenced within one hundred twenty (120) days of the arrival of the

prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this subsection shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a), but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to paragraph (e) of subsection (5), such indictment, in-

formation, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(5) Offer to deliver temporary custody. --

(a) In response to a request made under subsection (3) or subsection (4), the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in subsection (3). In the case of a federal prisoner, the appropriate authority in the receiving

state shall be entitled to temporary custody as provided by this section or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

1. Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given, and

2. A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary

custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in subsection (3) or subsection (4), the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this section shall be only for the purpose of permitting prosecution on the charge or charges contained in one (1) or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transac-

tion. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this section, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this section, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than

that for which temporary custody as provided in this section is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this section until such prisoner is returned to the territory and custody of the sending state, the state in which the one (1) or more untried indictments, informations, or complaints are pending or in which trial be being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The

provisions of this paragraphs shall govern unless the states concerned have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs or responsibilities therefor.

(6) Tolling period and limitations.--

(a) In determining the duration and expiration dates of the time periods provided in subsections (3) and (4), the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdic-

tion of the matter.

(b) No provision of this section, and no remedy made available by this section, shall apply to any person who is adjudged to be mentally ill.

(7) Designation of officer.-- Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement and who shall provide, within and without the state, information necessary to the effective operation of this section.

(8) Effectiveness and withdrawal. -- This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a

statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

(9) Construction and severability. -- This section shall be liberally construed so as to effectuate its purposes. The provision of this section shall be severable, and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person, or circumstance held invalid, the validity of the remainder of this section and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby.

If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full fore and effect as to the state affected as to all severable matters.

No. 90-795

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Supreme Court of the United States

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Petitioner,

vs.

RICHARD L. DUGGER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

WHETHER AN ALLEGED VIOLATION OF THE SPEEDY TRIAL PROVISIONS OF THE INTERSTATE AGREEMENT ON DETAINERS MUST SHOW PREJUDICE BEFORE THE CLAIM IS COGNIZABLE IN FEDERAL HABEAS CORPUS PROCEEDINGS.

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No. 90-795

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OPINIONS BELOW

The opinion of the United States Court of Appeals, Eleventh Circuit, is an unpublished opinion. The opinion is included in the Petitioner's Appendix. (Pet. App. A-1–A-7).

JURISDICTION

This court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent, RICHARD L. DUGGER, notes that the petitioner's statement of statutory provisions involved set forth § 921.45, Florida Statutes (the Interstate Agreement on Detainers), but omits 28 U.S.C. § 2254, which provides, in relevant part:

> **§ 2254. State Custody; Remedies in Federal Courts.**
>
> (a) The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Petitioner, having been charged by the State of Florida with first degree murder, five counts of armed robbery, six counts of armed kidnapping, and possession of a firearm during commission of a felony, claimed, in state court, that the indictment should be dismissed because he was not scheduled for trial within the 120 day period provided by article IV(c) of the Interstate Agreement on Detainers, Section 941.45(4)(c), Fla. Stat. (1983). (Resp. App. A-1). After the state trial court denied this claim, Petitioner entered a plea of nolo contendere to a reduced charge of second degree murder with a firearm and reserved the right to assert the claim on appeal to Florida's Third District Court of Appeal. (Resp. App. A-1).

On appeal, Florida's Third District Court of Appeal held that the 120-day provision of the statute was not violated:

> Applying the body of federal law which controls the interpretation of the IAD, *Cuyler v. Adams,* 449 U.S. 433, 438-42, 101 S.Ct. 703, 706-09, 66 L.Ed.2d 641, 647-50 (1980), we find that the delays complained of resulted from (a) Toro's own extended efforts to obtain counsel, *Naughton v. State,* 453 A.2d 796 (Del. 1982); *see United States v. Scheer,* 729 F.2d 164 (2d Cir. 1984); and (b) the lower court's setting the trial on a date which coincided with that required by and already set for a co-defendant and which afforded Toro's finally retained attorney sufficient time to prepare; it thus represented an entirely appropriate continuance for good cause as specifically authorized by Article IV(c) [citations omitted]. Hence, there was no violation of the defendant's rights under the statute. [citation omitted].
>
> In addition, it appears that the defense acquiesced in fixing the trial date beyond the statutory period and therefore may not now be heard to complain. [citation omitted].

(Resp. App. A-2)

The Petitioner then filed a petition for writ of habeas corpus in the United States District Court, Southern District of Florida, alleging that he was denied his right to a speedy trial under the Interstate Agreement on Detainers Act. (Resp. App. A-3–A-4). Specifically, the Petitioner claimed that he was not brought to trial within 120 days of his arrival in the State of Florida. (Resp. App. A-4). The Report and Recommendation of the United States magistrate set forth the Florida trial court's summary of the reasons for the Petitioner's delay in being tried:

> **THE COURT:** "Let me say that my comments at this point in time have nothing to do with you, Mr. Guttierez, on a personal basis, but I have to find that the many continuances in this case to the Defendant, and in this one, the co-defendant, was caused either by your client himself or by his series of lawyers and their activity or lack of activity during this course of time.... No one from the State caused the hearings to be canceled, the many, many depositions to be set and reset, the many trial dates to be set and reset and nobody from the State asked the material witness to disappear.
>
> All of this leads me to conclude that there was a waiver by the Defendant's actions of the Florida Speedy Trial Law, which I think, can be fairly applied to the Interstate Agreement on Detainers."

(Resp. App. A-5) Thus, the Magistrate's Report noted that the statute itself provided that the court having jurisdiction of the matter may grant any necessary or reasonable continuance. (Resp. App. A-5). The Report further found "that the Petitioner has failed to allege any injustice; much less to satisfy the requirement of 'a complete miscarriage of justice' with respect to his not being brought to trial within 120 days." (Resp. App. A-5). Therefore, the Magistrate recommended that the petition for writ of habeas corpus be denied. (Resp. App. A-5.)

The United States District Judge, after a de novo review of the record, entered an order of dismissal. (Pet. App. A-8). The Court found, pursuant to *Seymore v. State of Alabama,* 846 F.2d 1355 (11th Cir. 1988), "that where no prejudice is shown, a claim of speedy trial violation because of time periods prescribed by the Interstate Agreement on Detainers is not cognizable in a federal habeas corpus proceeding.

Violations of IAD have been held to be non-fundamental defects and, for that reason, are not cognizable." (Pet. App. A-9). The Court approved the Report and Recommendation of the Magistrate. (Pet. App. A-10).

On appeal to the Eleventh Circuit Court of Appeals, that Court adhered to its decision in *Seymore v. State of Alabama,* 846 F.2d 1355 (11th Cir. 1988), and affirmed the order of the District Court, concluding that the Petitioner's claim was not cognizable in federal habeas corpus proceedings in the absence of any showing of prejudice:

> ...The law of this circuit is that "various violations of the IAD are nonfundamental defects and — absent a showing of some sort of prejudice — are uncognizable in a federal habeas proceeding....
>
> In *Seymore,* we held that failure to comply with the time limits of Article III(a) is one such violation. 846 F.2d at 1359-60. Here, petitioner's claim is that the State of Florida violated the time provisions in Article IV(c) of the IAD. Because there is no principled manner in which to distinguish the nature of harm caused by a violation of the time limits in Article III (a) from a violation of the time limits in Article IV, Seymore dictates that petitioner's claim is only cognizable in federal habeas if he can make some showing of prejudice. No such allegation of prejudice has been made in this case.

(Pet. App. A-4–A-5)

REASONS FOR DENYING THE WRIT

THE WRIT SHOULD BE DENIED BECAUSE (1) REGARDLESS OF THE ISSUE OF COGNIZABILITY OF THE CLAIM IN FEDERAL HABEAS CORPUS PROCEEDINGS, INDEPENDENT GROUNDS EXIST FOR REJECTING THE PETITIONER'S CLAIM; AND (2) THE LOWER COURT'S DECISION IS A CORRECT STATEMENT OF THE LAW.

The lower court held, pursuant to *Seymore v. State of Alabama,* 846 F.2d 1355(11th Cir. 1988), that the Petitioner's claim was not cognizable in federal habeas corpus proceedings because no allegation of prejudice had been made. Regardless of the existence of conflict with decisions of other Circuit Courts of Appeals, sound reasons exist for denying the issuance of the writ.

First it is highly significant that both Florida's Third District Court of Appeal and the United States District Court found that the reasons for the delays in the commencement of the trial were attributable to the Petitioner and his counsel. Thus, Article IV(c) of the IAD, § 941.45(4)(c), provides that "for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." As the delays attributable to Petitioner and his counsel constitute "good cause" under the statute, Petitioner is not going to be entitled to relief even if the claim is deemed cognizable in federal habeas corpus proceedings. *See United States v. Scheer,* 729 F.2d 164 (2d Cir. 1984); *Naughton v. State,* 453 A.2d 796 (Del. 1982). Similarly, the setting of the trial on a date which coincided with that already requested by, and set for, a codefendant, and which afforded Petitioner's recently obtained counsel with sufficient time to prepare for trial, constituted good

cause under the IAD. *Naughton, supra; United States v. Odom,* 674 F.2d 228 (4th Cir. 1982), *cert. denied,* 457 U.S. 1125, 102 S.Ct. 2946, 73 L.Ed 2d 1341 (1982). Likewise, Petitioner's acquiescence in the fixing of the trial date beyond the statutory period precludes subsequent complaints about the timeliness of the trial date. *See, Pethtel v. State,* 427 N.E. 2d 891, 893-95 (Ind. App. 1981); *Foran v. Metz,* 463 F.Supp. 1088 (S.D.N.Y. 1979), *aff'd mem.* 603 F.2d 212 (2d Cir. 1979) *cert. denied,* 444 U.S. 830, 100 S.Ct. 58, 62 L.Ed.2d 38 (1979).

From the decisions of both the state appellate court and the United States District Court, it is clear that relief would not be available to Petitioner even if the claim is cognizable in federal habeas corpus proceedings. In *SS Monrosa v. Carbon Black Export, Inc.,* 359 U.S. 180, 184, 79 S.Ct. 710, 3 L.Ed.2d 723 (1959), this Court stated:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial.

An alleged conflict, when that conflict is irrelevant to the outcome of the case, should not be used as a vehicle for certiorari review.

A second reason for denying the writ is that the lower Court's decision, and *Seymore, supra,* on which that decision is based, are correct statements of the law. This Court has held that when determining whether nonconstitutional federal claims are cognizable in federal habeas proceedings:

> ... The appropriate inquiry was whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t ... present[s]

> exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."

Davis v. United States, 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974), *quoting Hill v. United States,* 368 U.S. 424, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962). A delay in a trial beyond the 120-day statutory period does not inherently render the trial unfair, does not inherently prejudice a defendant, and does not prevent the defendant from preparing for trial. Such a claim does not, therefore, result in any fundamental defect or miscarriage of justice. *Cf., Barker v. Wingo,* 407 U.S. 514, 530-36, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (discussing pertinent factors, including prejudice and reasons for delay, in determining when violation of constitutional right to spedy trial should result in dismissal); 18 U.S.C. § 3162(2) (factors for determining whether violation of time periods under Federal Speedy Trial Act shall result in dismissal with or without prejudice: seriousness of offense; facts and circumstances of case which led to dismissal; impact of reprosecution on administration of speedy trial act and on administration of justice). Indeed, the statute itself recognizes the non-fundamental nature of the issue by allowing for continuances based on good cause.

Moreover, as noted by both *Seymore,* 846 F.2d at 1359-60, and the Petitioner herein, *see* petition at pp. 21-23, the overwhelming majority of Circuits concur with the analysis and result of *Seymore. See Fasano v. Hall,* 615 F.2d 555 (1st Cir. 1980), *cert. denied,* 449 U.S. 861, 101 S.Ct. 201, 66 L.Ed.2d 86 (1980); *Edwards v. United States,* 564 F.2d 652, 654 (2d Cir. 1977); *Bush v. Muncy,* 659 F.2d 402 (4th Cir. 1981); *Kerr v. Finkbeiner,* 757 F.2d 604, 607 (4th Cir.), *cert. denied,* 474 U.S. 929, 106 S.Ct. 263, 88 L.Ed.2d 269 (1985); *Sassoon v. Stynchombe,* 654 F.2d 371 (5th Cir. Unit B 1981); *Mars v. United States,* 615 F.2d 704, 707 (6th Cir.), *cert. denied,* 449 U.S. 849, 101 S.Ct. 138, 66 L.Ed.2d 60 (1980);

Metheny v. Hamby, 835 F.2d 672 (6th Cir. 1987), *cert. denied,* 488 U.S. 913, 109 S.Ct. 270, 102 L.Ed.2d 258 (1988); *Huff v. United States,* 599 F.2d 860, 863 (8th Cir.), *cert. denied,* 444 U.S. 952, 100 S.Ct. 428, 62 L.Ed.2d 323 (1979); *United States v. Boniface,* 601 F.2d 390 (9th Cir. 1979); *Hitchcock v. United States,* 580 F.2d 964 (9th Cir. 1978); *Greathouse v. United States,* 655 F.2d 1032, 1034 (10th Cir. 1981), *cert. denied,* 455 U.S. 926, 102 S.Ct. 1289, 71 L.Ed.2d 469 (1982).

Of the cases cited by the Petitioner, for the proposition that alleged IAD violations are cognizable in federal habeas proceedings absent prejudice, only *United States v. Williams,* 615 F.2d 585 (3d Cir. 1980), even discusses the significance of *Davis, supra. Williams,* however, did not involve an alleged violation of the speedy trial time periods under IAD. *Williams* involved the anti-shuttling provisions of IAD. Thus, *Williams* does not expressly conflict with the instant case. Moreover, the Third Circuit, in a subsequent case, *Casper v. Ryan,* 822 F.2d 1283 (3d Cir. 1987), which did involve the speedy trial provisions of IAD, concluded that prejudice is needed in order for a defendant to prevail on such a claim. 822 F.2d at 1290-91. Even though the claim was cognizable, relief would ultimately be denied in the absence of proof of prejudice. *Casper,* and the Third Circuit, hardly differ from the Eleventh Circuit and the instant case. If a petitioner cannot even allege prejudice, there is no basis for expecting the petitioner to prove prejudice. Relief will thus be denied in both circuits. (*Casper,* for reasons detailed in that decision, felt that the anti-shuttling provisions of IAD raised fundamental violations while the speedy trial provisions did not).

While the decisions of the Ninth and Seventh Circuit Courts of Appeals, cited by the Petitioner and also noted in *Seymore, supra,* 846 F.2d at 1359, n. 7, do appear to conflict with the decision of the lower court, it is submitted herein that, pursuant to the reasoning of *Davis, supra,* the

Eleventh Circuit's analysis is correct. Furthermore, with respect to the Seventh Circuit decisions, *Metheny, supra,* 835 F.2d at 674, has observed that since they did not engage in *Davis* analysis regarding the fundamental/non-fundamental nature of the defect, those decisions should be viewed "as jurisdictional, not cognizability holdings." In such a light, those decisions would not be in conflict with the instant decision.

Finally, it should be noted that many of the above-cited decisions have resolved in denials of certiorari by this Court, notwithstanding the apparent existence of conflict. *Fasano, supra; Kerr, supra; Mars, supra; Huff, supra; Casper, supra; Greathouse, supra; Metheny, supra.* There is no compelling reason for granting certiorari in the instant case after repeatedly denying certiorari in similar situations. Indeed, the instant case presents greater reasons for not granting certiorari, as the state appellate court and United States District Court found the existence of alternative, independent grounds for denying relief.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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ANGEL TORO a/k/a/ SAMMY TORO,

Appellant,

vs. **CASE NO. 85-15**

THE STATE OF FLORIDA,

Appellee.

December 10, 1985

Gustavo Gutierrez, Miami, for appellant.

Jim Smith, Atty. Gen., and Calvin L. Fox, Asst. Atty. Gen., for appellee

Before SCHWARTZ, C.J. AND HENDRY AND NESBITT, JJ.

SCHWARTZ, Chief Judge.

The defendant's sole contention, preserved through the entry of a nolo plea, is that he is entitled to dismissal because he was not scheduled for trial within the 120 day period provided by Article IV(c) of the Interstate Agreement on Detainers, § 941.45(4)(c), Fla.Stat. (1983).[1] We disagree.

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1 Sect. 941.45(4)(c) provides:

(c) In respect of any proceeding made possible by this subsection, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Applying the body of federal law which controls the interpretation of the IAD, *Cuyler v. Adams,* 449 U.S. 433, 438-42, 101 S.Ct. 703, 706-09, 66 L.Ed.2d 641, 647-50 (1980), we find that the delays complained of resulted from (a) Toro's own extended efforts to obtain counsel, *Naughton v. State,* 453 A.2d 796 (Del. 1982); *see United States v. Scheer,* 729 F.2d 164 (2d Cir. 1984); and (b) the lower court's setting the trial on a date which coincided with that requested by and already set for a co-defendant and which afforded Toro's finally retained attorney sufficient time to prepare; it thus represented an entirely appropriate continuance for good cause as specifically authorized by Article IV(c). *Naughton v. State, supra; see United States v. Odom,* 674 F.2d 228 (4th Cir. 1982), *cert. denied,* 457 U.S. 1125, 102 S.Ct. 2946, 73 L.Ed. 1341 (1982). Hence, there was no violation of the defendant's rights under the statute. See cases collected, Annot., Validity, Construction, and Application of Interstate Agreement on Detainers, 98 A.L.R.3d 160 § 28(b)(1980).

In addition, it appears that the defense acquiesced in fixing the trial date beyond the statutory period and therefore may not now be heard to complain.[2] *Foran v. Metz,* 463 F.Supp. 1088 (S.D.N.Y. 1979), *aff'd mem.* 603 F.2d 212 (2d Cir. 1979), *cert. denied,* 444 U.S. 830, 100 S.Ct. 58, 62 L.Ed.2d 38 (1979); *Pethtel v. State,* 427 N.E.2d 891, 893-95 (Ind.App. 1981).

Affirmed.

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2 A different result on this point would be required by the Florida speedy trial law. *See Stuart v. State,* 360 So.2d 406 (Fla. 1978).

United States District Court
Southern District of Florida

CASE NO: 87-1959-CIV-PAINE
MAG. VITUNAC

ANGEL TORO,

Petitioner,

vs.

RICHARD L. DUGGER,
Secretary, Florida Department of Corrections,

Defendant(s)

REPORT AND RECOMMENDATION

This cause came before the Court on Order of Reference from United States District Court Judge James C. Paine, for a Report and Recommendation (DE 2).

The Petitioner, Toro, is presently incarcerated in a prison in the State of Florida, pursuant to a judgment of guilty of second degree murder with a firearm entered by the Circuit

Court of the Eleventh Judicial Circuit in Dade County, Florida. He has filed a Petition for a Writ of Habeas Corpus alleging that he was denied his right to a speedy trial under the Uniform Detainer law pursuant to Interstate Agreement on Detainers Act (Florida Statutes Section 941.45).

The basis of Petitioner's allegation is that he was not brought to trial within 120 days of his arrival in the State of Florida, pursuant to the act.

Petitioner contends that the Interstate Detainer Act is a law of the United States and thus his speedy trial issue is cognizable in a post-trial federal habeas proceeding.

While the Eleventh Circuit recognizes that the interstate compact on detainers is a law of the United States, the Eleventh Circuit does not recognize that all violations of laws of the United States may be asserted in a habeas proceeding. *See Seymore v. State of Alabama,* 846 F.2d 1355 at 1359. In that case the Eleventh Circuit quoted from *Davis v. United States,* 417 U.S. 333 (1974):

> "the appropriate inquiry [is] where the claimed error of law [is] 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[i]t... present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'"

The Eleventh Circuit goes on to say that, "violations of IAD are nonfundamental defects and – absent of showing of some sort of prejudice – are uncognizable in a federal habeas proceeding." *See Seymore* at 1359.

This Court has reviewed in full the facts and circumstances resulting in the Petitioner Toro not being tried within 120 days. The trial court best summarized this Court's finding with respect to the reasons for the

Petitioner's delay in being tried. The trial court's comments (appendix 218 through 219) include the language:

THE COURT: "Let me say that my comments at this point in time have nothing to do with you, Mr. Gutierrez, on a personal basis, but I have to find that the many continuances in this case to the Defendant, and in this one, the co-defendant, was caused either by your client himself or by his series of lawyers and their activity or lack of activity during this course of time.... No one from the State caused the hearing to be canceled, the many, many depositions to be set and reset, the many trial dates to be set and reset and nobody from the State asked the material witness to disappear.

All of this leads me to conclude there was a waiver by the Defendant's actions of the Florida Speedy Trial Law, which, I think, can be fairly applied to the Interstate Agreement on Detainers."

The agreement on detainers itself states that the court having jurisdiction of the matter may grant any necessary or reasonable continuance. See Florida Statute 941.45(4)(c).

This Court finds that the Petitioner has failed to allege any injustice; much less to satisfy the requirement of "a complete miscarriage of justice" with respect to his not being brought to trial within 120 days.

For the reasons stated above this Court respectfully recommends to the District Court that the Petition for a Writ of Habeas Corpus NOT ISSUE.

The parties have ten (10) days from the date of this Report and Recommendation to file their objections, if any, in writing to the Honorable James C. Paine, United States District Court Judge.

DONE and ORDERED this 22 day of September, 1989, at West Palm Beach in the Northern Division of the Southern District of Florida.

/s/_____
ANN E. VITUNAC
UNITED STATES MAGISTRATE

cc:
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